IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	No. 1:10-mc-109
	)	
Petitioner,	)	Hon. Gordon J. Quist
	)	
vs.	)	Hon. Hugh W. Brenneman, Jr.
	)	
MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,	)	
	)	
Respondent,	)	
	)	

AMICUS CURIAE BRIEF OF AMERICANS FOR SAFE ACCESS IN SUPPORT OF THE MICHIGAN DEPARTMENT OF COMMUNITY HEALTH

INTRODUCTION

Although fifteen states and the District of Columbia have decriminalized the possession and use of medical marijuana,[1] the federal government continues to treat these activities as criminal, which inspires fear in medical marijuana patients. Here, the federal government is seeking to obtain sensitive patient records. If successful, the fear that medical marijuana patients already have will be amplified tremendously, and it would chill protected physician-patient speech about medical marijuana. Under Rule 17(c)(2) of the Federal Rules of Criminal Procedure, this Court has the authority to quash a subpoena where compliance would be unreasonable or oppressive. The subpoena in this case is unreasonable, since it does great harm to Michigan's medical marijuana program and to the privacy of intimate patient records without any significant benefit to the government. It should be quashed for these reasons.

[1] Although state and federal law spell marijuana as "marihuana", the common spelling will be used herein.

ARGUMENT

THE SUBPOENA SHOULD BE QUASHED AS AN UNWARRANTED INTRUSION INTO MEDICAL PRIVACY

The subpoena directed at the Michigan Department of Community Health requests documents of the most intimate nature – medical records of sick and dying patients. By contrast, the records sought have little, if any, evidentiary value for the government. Under these circumstances, the balance tilts sharply in favor of confidentiality and the Court should exercise its judicial supervision to quash the subpoena.

Rule 17(c)(2) of the Federal Rules of Criminal Procedure provides that the court may quash a subpoena "if compliance would be unreasonable or oppressive." In determining whether to quash the subpoena, the Court must weigh the State's interest in protecting the integrity of its medical marijuana program and the confidentiality of its citizens' medical records against the government's interest in conducting a criminal investigation. *See In re Grand Jury, John Doe No. G.J. 2005-2*, 478 F.3d 581, 585 (4th Cir. 2007) (balancing a city's significant interest in preserving the confidentiality of its investigations and forestalling a potential violation of a person's Fifth Amendment rights against the government's interest in its criminal investigation). Federal courts have quashed subpoenas under Rule 17(c)(2) where they intrude upon significant interests outside the scope of a recognized privilege where compliance is likely to "entail consequences more serious than even severe inconveniences occasioned by irrelevant or overbroad requests for records." *In re Grand Jury Matters*, 751 F.2d 13, 18 (1st Cir. 1984).

Here, the privacy interests of medical marijuana patients and the State's interest in protecting them is paramount. Both federal law and state law recognize that medical records of individuals are to be afforded significant protection from disclosure. *See Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."); *Doe v. Southeastern Penn. Trans. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995) (recognizing privacy interest in prescription records); Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, §§ 261-64, 100 Stat. 1936 (Aug. 21, 1996); MCL 600.2157 (providing for physician-patient privilege, which forbids disclosure of information obtained through physician-patient communications).

Importantly, The Michigan Medical Marihuana Act, MCL 333.26421 *et seq.* ("MMMA") expressly provides for the confidentiality of the medical marijuana records sought by the government:

> (h) The following confidentiality rules shall apply:
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> (1) Applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.
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> (2) The department shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Individual names and other identifying information on the list is confidential and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.
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> (3) The department shall verify to law enforcement personnel whether a registry identification card is valid, without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card.
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> (4) A person, including an employee or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor,

punishable by imprisonment for not more than 6 months, or a fine of not more than $1,000.00, or both…

-- MCL 333.26426(h).

This law led the seven state-registered medical marijuana patients/caregivers to believe that the information and documents turned over to the Michigan Department of Community Health ("MDCH") would be kept strictly confidential; their expectation of privacy was more than reasonable.

Furthermore, compliance with the subpoena would severely hamper the proper functioning of the State's medical marijuana program, thereby implicating notions of comity, and invade patient privacy. *Cf. In re: The Matter of the Grand Jury Subpoena for THCF Medical Clinic Records*, 504 F.Supp.2d 1085, 1090-91 (E.D. Wash. 2007); *Northwestern Memorial Hosp. V. Ashcroft*, 362 F.3d 923, 932 (7th 2004) (noting that comity "impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy").

Compliance with the subpoena would also harm current and putative medical marijuana patients in other states. This case has received significant media attention and has been followed by countless medical marijuana patients and putative medical marijuana patients throughout the United States. Permitting the federal government to embark on a "fishing expedition" under the thinly veiled guise of "ensuring that the seven persons in this case are acting in compliance with the MMMA" must not be permitted. The information sought can be obtained by a much less intrusive means, as noted above. MCL 333.26426(h)(3). To permit the federal government access to the MDCH medical marijuana registry list would open a Pandora's Box. The medical marijuana registry list of the MDCH would become an easy source of information the federal government could access by subpoena of an agent whenever it desired. Federal government access would in essence, nullify the State's medical marijuana registry program, as it would have the net effect of keeping many medical marijuana patients from registering, out of fear of federal interference, thereby causing damage to many seriously ill persons who could benefit from the medicinal use of marijuana.

The government, on the other hand, has scant need to obtain these intimate medical, patient, physician, and caregiver records. The government states only that it has "been involved in an ongoing investigation of possible violations of the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, by various individuals in the Lansing, Michigan area" and that the medical records it seeks are "relevant to [this] ongoing investigation." *See* Declaration of Special Agent Chris Scott, filed December 23, 2010, at 1-2. The bare bones assertion of need by the government does not establish that the records it seeks will have any evidentiary value, since the fact that one is registered with the State as a medical marijuana patient does not, by itself, establish that he has committed any federal crime. *See Conant v. Walters*, 309 F.3d 629, 638 (9th Cir. 2002) (government could not justify its policy that threatened to punish a physician for recommending to a patient the medical use of marijuana on the ground that such a recommendation might encourage illegal conduct by the patient).

Underscoring this point is *In re: The Matter of the Grand Jury Subpoena for THCF Medical Clinic Records*, 504 F.Supp.2d 1085 (E.D. Wash. 2007), wherein the Court quashed a subpoena issued by a federal grand jury for medical records of medical marijuana patients maintained by the State of Oregon. That case is on all fours with the present one, as in that case -- as here, the federal government sought to obtain the medical records of seventeen medical marijuana patients in the course of grand jury proceedings. In reaching its determination to quash the subpoena for the medical marijuana patient records, the court reasoned as follows:

> The Court agrees that the State of Oregon has a significant interest in protecting the integrity of its medical marijuana program. Voters in Oregon approved the Oregon Medical Marijuana Act (OMMA) in 1998. Under Oregon law, Oregonians suffering from debilitating medical conditions are allowed to use small amounts of marijuana to mitigate the symptoms or effects of the person's debilitating medical conditions. Or.Rev.Stat. §§ 475.300, 475.302(8) (2007).
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> * * *
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> Under Oregon law, all names and other identifying information regarding medical marijuana registrants are confidential and protected from disclosure, except to authorized employees of the OMMP and authorized employees of state or local law enforcement, to the extent necessary to verify that a person is a lawful possessor of a medical marijuana registry identification card. Or.Rev.Stat. § 475.331(a) and (b); Or. Admin. R. 333-008-0050 (2007).
>
> If the State of Oregon were to comply with the subpoena, it would be violating its own laws. Notwithstanding the confidentiality provision found in the OMMA, the Oregon Public Records Acts protects health information from disclosure without authorization from the individual. Or.Rev.Stat. § 192.496(1). Moreover, individuals could be deterred from participating in the program if it were possible for the federal government to obtain this type of information.
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> On the showing made, the Government's subpoena is unreasonable.
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> The State of Oregon is a sovereign. While subject to the Supremacy Clause of the Federal Constitution, the State has an important interest in the integrity of its authorized medical programs and in keeping its contract with its citizens to preserve the confidentiality of their records.
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> -- *Id. at* 1089-91.

This reasoning is equally applicable here, as precisely the same interests are at issue.

The government's contention that *In re Grand Jury Subpoena* was wrongly decided [2] because that court did not give paramount consideration to the government's interest in enforcing federal law, is belied by the government's latest admission that it only seeks "copies of the registry cards themselves, and any applications that are given the effect of registry cards." Answer to Motion to Intervene, filed January 25, 2011, "Answer") at 17. This information sought, standing alone, does not constitute evidence of a crime. However, this is highly sensitive information regarding the treatment and medical condition of patients. It must be noted that the information sought is not necessary to the government's claimed attempt to enforce state law, Answer at 19 n.7, since the DEA could simply ask the Michigan Department of Community Health to provide the verification sought. In short, the Court in *In re Grand Jury Subpoena* got it right when it quashed the subpoena for medical marijuana records from the State of Oregon; this Court should do the same.

In sum, many factors support quashing the subpoena. Disclosure would intrude upon and reveal extremely sensitive and private information and cause harm to sick and dying persons. Disclosure would also cause damage to the delicate state-federal balance by seriously disrupting the proper functioning of the State's medical marijuana program. Lastly, the potential benefits of the subpoenaed information are at best negligible. Accordingly, the subpoena is unreasonable and this Court should quash it.

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[2] The government argues that, *In re Grand Jury Subpoena* should not be followed and is distinguishable on its facts, since the recipients of the subpoenas were challenging the subpoenas. Answer, at 17. The MDCH, however, has filed a motion to quash the subpoena and the Court has the discretion to hear from all interested parties, thus this distinction is of little consequence. If the government's argument is successful, it will necessitate the disclosure of the names of the seven targets of the subpoena – prior to ordering production of medical records -- so that the targeted persons can weigh in on this case.

CONCLUSION

For the foregoing reasons, the subpoena should be quashed pursuant to Rule 17(c)(2) of the Federal Rules of Criminal Procedure.

January 27, 2011

Respectfully Submitted,

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